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6 IN THE UNITED STATES DISTRICT COURT
7
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 DAVID B. GREEN,

10 Plaintiff,

No. C 05-02410 JSW

11 v.

12 MINNESOTA LIFE INSURANCE
13 COMPANY, STANDARD INSURANCE
14 COMPANY, and DOES 1 to 10,

Defendants.
_____ /

**ORDER GRANTING
PLAINTIFF'S MOTION TO
REMAND ACTION TO STATE
COURT**

15
16 Now before the Court is plaintiff David B. Green's ("Plaintiff") motion to remand this
17 action to the California Superior Court for the City and County of San Francisco. Having
18 carefully reviewed the parties' papers, considered their arguments and the relevant legal
19 authority, and good cause appearing, the Court hereby GRANTS Plaintiff's motion to remand.

20 **BACKGROUND**

21 Plaintiff originally filed this action on May 9, 2005 in San Francisco Superior Court
22 against defendants Minnesota Life Insurance Company ("Minnesota Life") and Standard
23 Insurance Company ("Standard") (collectively "Defendants") for breach of contract and breach
24 of the covenant of good faith and fair dealing. Plaintiff is insured under an individual disability
25 insurance plan issued by Minnesota Life. (Compl. at ¶ 7.) Plaintiff's policy was acquired by
26 Standard. (Br. at 2.) Plaintiff alleges that when he became disabled, Defendants wrongfully
27 denied his claim for disability insurance benefits, thereby breaching the terms of the contract
28 and implied covenant of good faith and fair dealing. (Compl. at ¶ 20.)

1 Plaintiff served Minnesota Life with a summons and a copy of the complaint on May 12,
 2 2005, and served Standard on May 16, 2005. Defendants filed a joint notice of removal on June
 3 14, 2005 based on diversity of citizenship under 28 U.S.C. § 1332. (Notice of Removal at ¶ 5.)
 4 The notice of removal stated that both defendants had been served on May 16, 2005. (*Id.* at ¶¶
 5 1, 2.)

6 Plaintiff filed a motion to remand on July 13, 2005 based on Defendants' failure to
 7 timely file a notice of removal. (Br. at 2.) On September 1, 2005, one hundred and twelve days
 8 after Minnesota life was served, and one hundred and eight days after Standard was served,
 9 Defendants jointly filed an amended notice of removal and an opposition to Plaintiffs' motion to
 10 remand. In the amended notice of removal, Defendants alleged for the first time that Minnesota
 11 Life was an improper defendant that should be disregarded for purposes of determining removal
 12 jurisdiction. (Opp. Br. at 2; Amended Notice of Removal at ¶ 2.)

13 DISCUSSION

14 A. Legal Standard

15 A defendant may remove a state civil action to federal court if the action originally could
 16 have been brought in federal court. 28 U.S.C. § 1441. A defendant who wishes to remove to
 17 federal court must file a notice of removal within thirty days after the receipt by the defendant of
 18 formal service of process. 28 U.S.C. § 1446; *Murphy Bros., Inc. v. Michetti Pipe Stringing,*
 19 *Inc.*, 526 U.S. 344, 354-56 (1999). "The time limit is mandatory and a timely objection to a late
 20 petition will defeat removal." *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir.
 21 1980). In addition, the Ninth Circuit "strictly construes the removal statute against removal
 22 jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (internal citations omitted).
 23 Therefore, the defendant bears the burden of establishing that removal is proper given the strong
 24 presumption against removal jurisdiction. *Id.*

25 B. Plaintiff's Motion to Remand

26 Plaintiff moves to remand based on Defendants' failure to remove this action within
 27 thirty days after service of process on the first-served defendant, Minnesota Life. (Br. at 1.)
 28 Plaintiff further argues that Defendants cannot belatedly amend their notice of removal to state

1 that Minnesota Life was fraudulently joined. (Br. at 2.) The parties do not dispute that the
 2 notice of removal was untimely if the thirty-day removal period commenced when Minnesota
 3 Life received service of process. (Br. at 1; Opp. Br. at 2.) Defendants argue, however, that the
 4 thirty-day period should begin when Standard was served because: (1) the last-served defendant
 5 rule applies; (2) Plaintiff has suffered no prejudice; and (3) Minnesota Life is an improper
 6 defendant. The Court will address each argument in turn.

7 **1. The First-Served Rule Applies.**

8 Within the Ninth Circuit there is a split in authority over when service of process triggers
 9 the thirty-day removal period in cases involving multiple defendants. *United Computer Sys. v.*
 10 *AT & T Info. Sys., Inc.*, 298 F.3d 756, 763 n.4 (9th Cir. 2002) (noting the split while
 11 “express[ing] no opinion [at that time] as to the propriety of either rule”). Under the first-served
 12 rule the removal period in multi-defendant cases commences for all defendants upon formal
 13 service of process on the first-served defendant. *Id.* at 762. The last-served rule grants each
 14 defendant thirty days from the date the defendant was served to file a notice of removal. *Smith*
 15 *v. Mail Boxes, Etc.*, 191 F. Supp. 2d 1155, 1158 (E.D. Cal. 2002). The first-served rule “has
 16 been apparently adopted by the majority of courts that have addressed this issue.” *Id.* at 762;
 17 *but cf. Smith*, 191 F. Supp. 2d at 1159 (“Although several decisions refer to the first-served rule
 18 as the majority rule and the last-served rule as the minority rule ... it is not entirely clear to this
 19 court that the first-served interpretation constitutes the majority rule.”) (internal citations
 20 omitted).

21 The first-served rule is consistent with the strong presumption against the exercise of
 22 removal jurisdiction. *See McAnally Enterprises, Inc. v. McAnally*, 107 F. Supp. 2d 1223, 1229
 23 (C.D. Cal. 2000) (“[T]his Court finds the [first-served] rule to be more persuasive, especially in
 24 light of the rule requiring removal statutes to be construed narrowly.”). The rule also provides
 25 for “early determination of the forum in which litigation is to take place.” *Morgan v. Asbestos*
 26 *Defendants (BHC)*, No. C 02-05761 WHA, 2003 WL 945987, at *2 (N.D. Cal. Feb. 28, 2003).

27 Courts have found it fair to impose the first-served rule in cases where a careful
 28 defendant could have determined who the other defendants were and filed in a timely fashion.

1 See, e.g., *Varney v. Johns-Manville Corp.*, 653 F. Supp. 405, 406-07 (N.D. Cal. 1987) (finding
2 the last-served rule “unnecessarily broad because in most cases ... a careful defendant can
3 determine who the other defendants are and request that they join the petition to remove”); *Big*
4 *B Automotive Warehouse Distrib., Inc. v. Coop. Computing, Inc.*, No. SC 00-2602, 2000 WL
5 1677948, at *2 n.4 (N.D. Cal. Nov. 1, 2000) (finding that the removal period commenced when
6 the earlier-served defendant received service of process because the later-served defendant was a
7 wholly-owned subsidiary with the same attorneys and designated agent for process). To the
8 extent the first-served rule encourages plaintiffs to manipulate service of process or join sham
9 defendants in an attempt to thwart removal jurisdiction, it need not be applied when an
10 inequitable result would follow. See *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986)
11 (noting “exceptional circumstances” might warrant application of the last-served rule); *Biggs*
12 *Corp. v. Wilen*, 97 F. Supp. 2d 1040, 1045 (D. Nev. 2000).

13 Here, Defendants have not pointed to any exceptional circumstances to warrant applying
14 the last-served rule. Defendants filed a notice of removal thirty-three days after Minnesota Life
15 was served due to the “misconception” that both defendants had been served on the same day
16 (Opp. Br. at 1-2). Given that Defendants had joint counsel at the time the notice of removal was
17 filed, and that Standard is responsible for Minnesota Life’s defense, ordinary diligence should
18 have revealed the date on which Minnesota Life was served. Nor do the papers suggest that
19 Plaintiff acted in bad faith when attempting service of process on Defendants. Plaintiff served
20 Minnesota Life on a Thursday, while serving Standard on the following Monday. The Court,
21 therefore, finds it appropriate to apply the first-served rule in this case.

22 2. Lack of Prejudice Does Not Excuse the Timeliness Requirement.

23 Defendants further argue that the Court should deny the motion to remand because
24 Plaintiff was not prejudiced by the untimely notice of removal. (Opp. Br. at 6.) However,
25 Defendants have not provided, nor has the Court found, any authority demonstrating that the
26 thirty-day rule may be waived solely based on a lack of prejudice. Accordingly, the Court
27 rejects Defendants’ argument.
28

1 **3. Defendants' Attempt to Amend Their Notice of Removal Was Untimely.**

2 Defendants filed an amended notice of removal over one-hundred days after they
3 received service of process. The amended removal notice states that Minnesota Life was
4 fraudulently joined. Defendants argue that due to the fraudulent joinder, Minnesota Life should
5 be disregarded in determining whether removal was timely. Plaintiff counters that Defendants'
6 attempt to substantively amend their notice of removal after the thirty-day deadline is improper
7 and thus the additional arguments raised in the amended notice should not be considered by this
8 Court. The Court concludes that Defendants' attempt to amend their notice of removal is
9 untimely, and therefore, the Court will not consider whether Minnesota Life actually is only a
10 nominal defendant.

11 It is well-established that a notice of removal may not be amended to add a separate
12 basis for removal jurisdiction after the thirty-day removal period has expired. *ARCO Envtl.*
13 *Remediation, L.L.C. v. Dept. of Health and Envtl. Quality of the State of Mont.*, 213 F.3d 1108,
14 1117 (9th Cir. 2000), *citing O'Halloran v. University of Wash.*, 856 F.2d 1375, 1381 (9th Cir.
15 1988). Moreover, leave to amend a notice of removal may be denied even before the thirty-day
16 period has expired. *See Clifton v. Cytodyne Technologies, Inc.*, No. C-02-1835-VRW, 2002 WL
17 31056634, at *1 (N.D. Cal. April 16, 2002). Untimely amendments are permissible only to
18 allow for the correction of a technical defect in the form of a notice. *See e.g., ARCO*, 213 F.3d
19 at 1117 (noting that amendment could be permitted to correct a defective allegation of
20 jurisdiction if the omitted fact(s) were in the record of the state court proceedings); *Barrow*
21 *Development Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317-18 (9th Cir. 1969) (granting leave to
22 amend where the removal petition included the corporations' states of citizenship but failed to
23 name their places of incorporation and principal places of business).

24 Here, Defendants are correcting more than a technical defect. Their proposed
25 amendment adds a new substantive basis to support removal jurisdiction. Defendants could
26 have presented their argument "upon first receiving the complaint, as it was their burden to do."
27 *Simpson v. Union Pacific RR Co.*, 282 F. Supp. 2d 1151, 1158 (N.D. Cal. 2003); *cf. Kaneshiro*
28 *v. N. Am. Co. for Life and Health Ins.*, 496 F. Supp. 452, 455-56, 462 (D. Haw. 1980) (finding

1 in the context of extension of time to remove under 28 U.S.C. § 1446(b) that ‘the burden is on
2 the defendant seeking removal to scrutinize the case and remove it in a timely fashion’).
3 Because Defendants failed to raise the issue of fraudulent joinder in their amended removal
4 notice, the Court will not consider this argument. Accordingly, the Court holds that the time to
5 remove began to run when Minnesota Life was served, and thus Defendants’ removal is
6 untimely.

7 CONCLUSION

8 For the foregoing reasons, Plaintiff’s motion to remand is GRANTED and the case is
9 hereby REMANDED. All further proceedings will be heard in State Court.

10 **IT IS SO ORDERED.**

11
12 Dated: November 1, 2005



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

United States District Court

For the Northern District of California